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In The  
**United States Court of Appeals**

For the Ninth Circuit

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GEORGE B. HATCHETT,

Appellant,

vs.

THE GOVERNMENT OF GUAM,

Appellee.

*This only*

On Appeal from the ~~United States~~ District Court  
for the Territory of Guam.

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**APPELLEE'S PETITION FOR A REHEARING**

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**FILED**

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No. 13803

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**APPELLEE'S PETITION FOR A REHEARING**

*To the Court as Constituted in the Original Hearing of the  
Above Entitled Appeal, Namely: Denman, Chief Judge,  
and Healy and Pope, Circuit Judges:*

Appellee, the Government of Guam, respectfully petitions for a rehearing in this case.

**REQUIREMENT OF INDICTMENT BY  
GRAND JURY**

1. The function of court rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regula-

tion of the forms, operation and effect of process, and the prescribing of forms, modes, and times for proceedings. But no rule of court can enlarge or restrict jurisdiction. It cannot modify substantive law.<sup>1</sup>

The scope, purpose and construction of the Federal Rules of Criminal Procedure<sup>2</sup> are set forth within the rules themselves and are as follows:

“Rule 1. Scope — These rules govern the procedure in the courts of the United States and before United States Commissioners in all criminal proceeding, with the exceptions stated in Rule 54.”

*Fed. Rules Cr. Proc. rule 1, 18 U.S.C.A.*

“Rule 2. Purpose and construction — These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.”

*Fed. Rules Cr. Proc. rule 2, 18 U.S.C.A.*

No place is it stated in the Federal Rules of Criminal Procedure<sup>2</sup> that the purpose of these rules is to give the court power to enlarge or modify substantive law.

The Fifth Amendment of the Constitution of the United States reads, in part as follows:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. \* \* \*”

The above excerpt from the Fifth Amendment has been repeatedly held to apply to Federal criminal cases only

<sup>1</sup> *Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629.

<sup>2</sup> *Fed. Rules Cr. Proc.*, 18 U.S.C.A.

and is not a limitation on the powers of a state or a territory.<sup>3</sup>

A federal grand jury is a creature of statute, and may not be impaneled under any inherent power of a United States court.<sup>4</sup>

No study of the Organic Act of Guam<sup>5</sup> brings forth any provision for a grand jury for the unincorporated territory of Guam although this same Organic Act provides for and sets up a government for Guam with separation of powers into executive, legislative, and judicial. The Bill of Rights of the Organic Act of Guam is comparable to the Bill of Rights of the Constitution of the United States and it contains in Section 5, (d), (e) and (f)<sup>6</sup> similar provisions contained in the Fifth Amendment of the Constitution of the United States, but the provision of the Fifth Amendment relative to answering for a capital or infamous crime unless on presentment or indictment of a Grand Jury is not contained in the Bill of Rights for Guam, this provision could not have been eliminated through error, but must have been eliminated for the intentional reason that Congress did not desire Guam to have the grand jury system of indictment.<sup>7</sup> The legislature of Guam has not seen fit to

<sup>3</sup> *Hawaii v. Mankichi*, 190 U.S. 197.

*Palmer v. Ohio*, 248 U.S. 32.

*State v. Nordstrom*, 7 Wash. 506; 164 U.S. 705.

<sup>4</sup> *United States v. Johnson*, 319 U.S. 503.

<sup>5</sup> The Organic Act of Guam. Public Law 630, 81st Congress, Chapter 512 as amended by Public Law 248, 82nd Congress, Chapter 655.

<sup>6</sup> The Organic Act of Guam, supra:

"Sec. 5 (d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.

(e) No person shall be deprived of life, liberty, or property without due process of law."

(f) Private property shall not be taken for public use without just compensation."

<sup>7</sup> Section 5. Provides for a bill of rights granting the Guamanians protection against infringement of personal freedom. The Bill of Rights is modeled upon the United States Constitution, but does not expressly provide for trial by jury in Guam. Since Guamanians derive their tradition in law from Spain, a civil law nation, they have little knowledge or experience in trial by jury. The Guam Congress could institute trial by jury if it so desired.

United States Congressional Code, Congressional Service, 81st Congress, Second Session, Vol. 2, Legislative History, p. 2854.

enact legislation creating a grand jury system. The intent of the law making power will prevail even against the letter of the statute.<sup>8</sup>

The District Court of Guam has dual jurisdiction for criminal offenses arising against the United States and certain criminal offenses arising against the government of Guam. There is no direct law of the United States nor of the government of Guam which requires a person answering to a crime or to an offense against the government of Guam to answer on a presentment or indictment of a grand jury. Hatchett, the appellant in this cause, was convicted for an offense against the government of Guam. The rules of court can only be applied to that which has been created by law, the rules cannot extend the law by inference, the procedure set forth in the rules for indictment by grand jury can only apply where provisions for a grand jury have otherwise been provided for by law. There is no such law for Guam and indictment by grand jury should not be required for prosecution of capital or other infamous crimes in Guam.

### **SINGLE RULE OF PROCEDURE FOR DISTRICT COURT**

2. The determination that a single system of procedure is to be followed in respect to all criminal cases in the District Court of Guam, those arising against the United States and those arising against the government of Guam, raises the undetermined question as to the application of the criminal rules of procedure and whether or not such opinion complies with the intent of Congress. There is no question that Congress has given to the District Court of Guam dual jurisdiction over offenses against the United States arising from the laws of the United States and offenses against the government of Guam arising from the

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<sup>8</sup> *Hawaii v. Mankichi*, supra.

laws of the government of Guam", but Congress has likewise given to Guam an extended amount of self-government and to the legislature of Guam certain power to enact legislation.

Throughout the Federal Rules of Criminal Procedure reference is made to the term "attorney for the Government" and in Rule 54 (c), under "Application of Terms," "Attorney for the government" is determined as "the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant of a United States attorney." A strict or narrow interpretation of this rule will defeat the intent of Congress in providing self-government for Guam and the right of the Guam legislature to enact legislation for the government of Guam. The legislature of Guam has provided that the Island Attorney, an official of the government of Guam appointed by the Governor of Guam, shall be the public prosecutor and conduct on behalf of the government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in the District Court of Guam.<sup>9</sup> The Island Attorney of Guam is not one of those persons designated in Rule 54 (c) of the Federal Rules of Criminal Procedure as "Attorney for the government."

The adoption of a single system of procedure, and this court has stated that Section 22 (b) of the Organic Act of Guam provides but a single system of procedure, namely the Federal Rules of Criminal Procedure, for the District Court of Guam and a strict interpretation thereof creates

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<sup>9</sup> The Organic Act of Guam, Sec. 22a, supra.

<sup>10</sup> Sec. 265. Appointment; deputies — The Governor of Guam shall appoint an Island Attorney and a suitable number of Deputy Island Attorneys, all of whom shall be subject to removal by the Governor.

Sec. 266. Duties generally — The Island Attorney is the public prosecutor and, by himself or a deputy, shall:

(1) Conduct on behalf of the Government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in the District Court or the Island Court and, when directed by the Attorney General, the prosecution of those offenses which are prosecuted in the Police Court.

a conflicting situation in the prosecution of criminal offenses in the District Court of Guam.

Prosecution is generally defined as the complete process of a criminal proceeding.<sup>11</sup> The official of the government of Guam charged with the prosecution of all offenses against the laws of Guam cannot fulfill his obligations as he is not an "attorney for the government" under the Federal Rules of Criminal Procedure, this is in violation of the intent of Congress to provide self-government for Guam as it defeats, by inference, the right of the designated official of Guam to prosecute criminal offenses in the District Court of Guam arising from the laws of Guam.

### CONCLUSION

3. When rules of a court are in conflict with law, the rules must give. There is no law to support indictment by grand jury in Guam, also, provisions of the Federal Rules of Criminal Procedure are in conflict with both laws of the United States and the laws of Guam so a single rule of procedure for the District Court of Guam based on the Federal Rules of Criminal Procedure cannot apply. It was not the intent of the law making body to have indictment by grand jury in Guam nor conflict in procedure in the District Court of Guam.

### REHEARING EN BANC

4. It is suggested that this case should be reheard en banc.

Respectfully submitted,

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LEON D. FLORES,  
JOHN A. BOHN,

Attorneys for Appellee and Petitioner.

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<sup>11</sup> *Words and Phrases*, Vol. 34, p. 624.

## CERTIFICATE OF COUNSEL

I, Howard D. Porter, of counsel for appellee and petitioner above named, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

*Howard D. Porter*  
HOWARD D. PORTER,  
Attorney for Appellee  
and Petitioner.

